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September 30, 1993

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SEP 30 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. William Caton
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Comments of TKR Cable Company
Rate Regulation
MM Docket No. 92-266

Dear Mr. Caton:

Enclosed please find an original and four copies of Comments in the above-referenced matter. Should you have any questions regarding this, please contact the undersigned counsel.

Sincerely,

James E. Meyers

James E. Meyers
Counsel for
TKR Cable Company

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SEP 30 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation	MM Docket 92-266

COMMENTS OF TKR CABLE COMPANY

TKR Cable Company
By: James E. Meyers
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September 30, 1993 202/686-3200

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SUMMARY

In its Comments, TKR Cable Company ("TKR"), requests the Commission to allow cable companies that must incur costs for franchise required upgrades to recover those costs as external costs which are supplemental to the benchmark rate. TKR specifically requests that the Commission recognize that the excessive administrative and financial costs attendant to the cost-of-service showings are not appropriate where the costs are incurred as a result of franchise requirements. TKR further requests that the Commission allow this expedited manner of recovering the cost of upgrades, because such upgrades will increase consumer choice and options, improve the quality of service and permit cable companies to compete as a broadband platform for communications services.

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In the Matter of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation	MM Docket 92-266

COMMENTS OF TKR CABLE COMPANY

TKR Cable Company ("TKR"), by its attorneys, herewith submits these comments in the Commission's Third Notice of Proposed Rulemaking in the above-referenced matter, FCC 93-428, released on August 27, 1993 ("Notice").

TKR Cable Company is a privately held multiple system operator which provides cable service through systems located in New Jersey, New York and Kentucky.

I. EXTERNAL TREATMENT SHOULD BE AFFORDED TO CABLE OPERATORS FOR COSTS OF UPGRADES REQUIRED BY LOCAL FRANCHISING AUTHORITIES.

A. External Cost Treatment Is Appropriate Under Benchmarks.

In the Notice, the Commission has requested comments on whether to allow external cost treatment for costs of upgrades required by local franchising authorities.[1] TKR agrees with the Commission that the present benchmarks do not contain any

[1] Notice, ¶ 153.

provision for upgrades and believes it is virtually impossible to develop a benchmark that would be sensitive to system upgrades required by the many and diverse franchising authorities.

TKR strongly urges the Commission to permit external cost treatment for costs of upgrades required by franchising authorities.[2]

1. **External Treatment Of Upgrade Costs Permits Necessary Rapid And Efficient Cost Recovery Essential To The Economic Well-Being of Cable Systems.**

Required upgrade costs for cable operators are substantial. In TKR's case, these costs approach a quarter of a billion dollars. They represent bringing on-line many features and capabilities, as well as new channel capacity for TKR's diverse customer base. If TKR and other cable operators are not able to rapidly and efficiently recover these costs, the upgrades and their associated benefits will be seriously jeopardized, not to mention the very real specter of significant impairment to the cable operator's economic viability.

2. **Required Upgrade Costs Are Easily Identifiable And Not Necessarily An Extraordinary Component Of Capped Rates.**

Upgrade costs are easily identifiable, lending themselves to external treatment. They also are not necessarily an extraordinary component, or even a significant component of

[2] Notice, ¶ 153, n.259.

capped rates.[3] In TKR's case, the average upgrade ranges from between \$450 to \$500 per subscriber. TKR's average franchise term is 10 years. To recover a \$450 per subscriber investment with an 11.25% return over a 10 year period, TKR would require an increase in revenue of approximately \$75 per year, per subscriber. Under the benchmark provisions, TKR would only be able to recover approximately \$36 a year for an additional 20 channels.[4] Therefore, the incremental cost to the individual subscriber over that permitted by the benchmark would only be \$39 per year -- an insignificant financial amount for the individual subscribers, but a substantial amount for TKR to lose over all subscribers.

Moreover, in TKR's case, a large percentage of upgrades to its cable systems are dictated by the local franchising authority. Because these required upgrade costs can be readily identified, attributed on a per subscriber basis, and are not necessarily a significant component of capped rates, they lend themselves to external treatment in conjunction with the Commission's overall benchmark approach.

3. Required Upgrade Costs Are Inherently Reliable Expenditures In Furtherance Of A Public Interest Finding.

Required upgrades reflect expenditures in furtherance of the franchising authority's public interest determination. By providing external cost treatment for franchise required

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[3] See Notice, ¶ 153.

[4] Assuming external treatment for actual programming customers.

upgrades, the Commission would be validating local government's public interest determination of cable-related community needs and interests. In the context of franchise renewals, this local government determination is required by statute to consider the cost of an upgrade when determining whether to require the upgrade.[5] Further, franchise required upgrades are the result of a careful, negotiated process between the local franchising authority and the cable operator.[6] Accordingly, upgrade costs required by franchising authorities are presumptively legitimate and beneficial, justifying their external treatment under price caps.

B. Cost-Of-Service Is Inappropriate For Franchise Required Upgrades.

Full blown or even streamlined cost-of-service showings are not appropriate with respect to franchise required upgrades. As the Commission recognized in its Cost-Of-Service Notice[7], cost-of-service showings impose serious administrative and financial burdens on franchise authorities, the Commission and cable operators. Further, the Commission identified the policy goal stated by Congress in the Cable Television Consumer Protection

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[5] See 47 U.S.C. § 546(c)(1)(D).

[6] In many cases, local franchise authorities refuse to renew cable franchises unless the operator agrees to implement the upgrades required by the franchising authority.

[7] In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Notice of Proposed Rulemaking, MM Docket No. 93-215, FCC 93-353 (1993).

and Competition Act of 1992[8] of promoting economically justified improvements by cable operators to facilitate the development of an advanced telecommunications infrastructure.[9]

Moreover, any costs incurred in a cost-of-service showing are costs that represent available funds which cannot be allocated to upgrading the system. The time delay in undertaking a cost-of-service showing likewise delays required and desirable plant modernization.

C. Desirable Features And Results Of External Treatment Of Required Upgrades.

In order to ensure accomplishment of franchising goals while furthering federal cable communications policy, the Commission should institute features for external cost treatment of franchise required upgrades that provide cable operators the opportunity to modernize their systems, while ensuring that franchise required upgrades are performed in a timely and cost-effective manner. These features include: (1) acknowledging a contextual rather than strictly literal approach to identify upgrades required by the franchising authority; (2) permitting the cable operator to schedule the upgrade and cost-recovery rate adjustments independently of each other over the necessary recovery term; (3) permitting recovery of voluntary upgrade costs, particularly the addition of channels, if undertaken in

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[8] Pub. L. No. 102-385, 106 Stat. 1460, § 2(b)(3) (1992).

[9] In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Notice of Proposed Rulemaking, MM Docket No. 93-215, FCC 93-353, ¶ 9 (1993).

conjunction with the required upgrade; and (4) preserving a level playing field for all multichannel video programming distributors, which includes both cable systems and telephone delivered video dial tone.

By embodying these features in the external cost treatment of franchise required upgrade costs, congressional intent would be satisfied while providing incentive to cable operators to continually modernize their cable systems without the encumbrance of extensive cost-of-service showings. Continual upgrades made to cable systems will, consequently, further the Commission's additional goal of enabling cable operators to respond to competitive forces that are currently in the marketplace.[10]

1. Contextual Approach To Identifying Required Upgrades.

A contextual rather than strictly literal approach should be applied in identifying upgrade requirements of a franchising authority. Where the cable operator must incur capital costs to meet performance levels required of it (e.g. "to provide a full array of service to all the residents"; "to have adequate channel capacity"; "to provide service in keeping with advancements in technology"), the cable operator should be afforded external treatment of those costs as well. The cable operator is charged with discerning its upgrade obligations and, commensurately, the associated costs. Moreover, costs incurred

[10] Id. at ¶ 9.

in meeting such requirements are inherently reasonable owing to the incentive (in both a regulated and unregulated environment) to accomplish the upgrade cost-effectively. There is little incentive, even under traditional cost-of-service principles, to "gold-plate" facilities at this transitional juncture. Most upgrade obligations were incurred in an unregulated environment, prior to the 1992 Cable Act, and were based on realistic assessments of customer and community needs and interests. Their implementation now does not change their inherent validity. Moreover, consumer attitudes will not permit questionable injudicious cost.

2. Scheduling Of Upgrade And Phased-In Cost Recovery Rate Adjustments.

External recovery of upgrade costs should be available over the entire franchise and any renewal term, regardless of when the cost is actually incurred. Such multi-year adjustments would ensure that rate changes reflecting the upgrade can be optimally minimized and that the costs are fully recoverable. Phased-in rate adjustments reflecting the costs of the upgrade independent in time from the undertaking of the upgrade spares customers from asymmetrical and potentially steep rate increases. Phased-in rate adjustments likewise contribute to overall lower upgrade expense because the cable operator is able to more efficiently budget and procure upgrade materials and services.

By the same token, cable operators should be permitted to schedule the upgrade at any time during the applicable term.

If, for example, available labor and materials can be secured more economically in advance of or after the required commencement of the upgrade, the cable operator should be permitted to undertake the upgrade at that time. Likewise, where TKR has systems with multiple franchises that have different expiration dates, TKR should have the flexibility to perform the upgrade on all of the systems at the same time. In TKR's case, significant upgrade efficiencies can be achieved in each of its systems by scheduling multiple upgrades. Economies of scale and significant savings can be realized overall and on a system-by-system basis. Where the upgrade is accomplished ahead of schedule, the customers will realize the benefits sooner, and in no case would delays occur beyond the required term.

3. Voluntary Features In Conjunction With Required Upgrade.

The Commission should allow cable operators to include the costs of voluntary upgrade features if undertaken as part of the required upgrade. For example, a franchising authority may require an upgrade of a system from 42 to 60 channels during a renewal term. Were the cable operator to upgrade the system to 78 channels, the attendant costs for the additional channels should be afforded external treatment as well. Such supplemental upgrades serve merely to augment the franchise required upgrade, while further enhancing the cable system. Because the voluntary portion of the upgrade was undertaken conterminously with the required upgrade, modernization of the plant has occurred efficiently and in a cost-effective manner that ought to be rewarded by external treatment. Full recovery of such voluntary upgrade costs is consistent with the policy of the 1992 Cable Act to ensure that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems.[11]

4. Preserving A Level Playing Field.

One important consideration for permitting external cost treatment of upgrades under price caps is the changing nature of consumer demand and technology and the importance that a level playing field be maintained for all multichannel video programming distributors. Emerging technologies and expanded telephone participation are formidable adversaries to the cable industry. It is essential that cable operators be able to make upgrades that will allow them to adequately compete with these competitors, including the telephone companies which are increasingly gaining competitive advantages over the cable industry. Such inequities are illustrated in New Jersey, where New Jersey 2000 is in progress.[12] The fiberization of telephone

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[11] 1992 Cable Act, § 2(b)(3).

[12] New Jersey 2000 is an agreement between New Jersey Bell Company and the State of New Jersey, whereby New Jersey Bell will completely fiberize New Jersey in exchange for favorable regulatory rate treatment for competitive services. Any competitive services would receive unregulated rate treatment, while rates for non-competitive services would be regulated under a new method. Although, the new method would freeze rates from the present through 1996 and increase rates with certain caps thereafter, the actual cost of providing service for the services that were capped has decreased.

plant in New Jersey has created an unfair playing field in New Jersey for the cable industry by new, unregulated competitive services such as video dialtone. Through the "deal" struck under New Jersey 2000, the telephone company was able to substantially modernize its infrastructure. TKR, on the other hand, has had its rates capped just at the time it was scheduled to upgrade its facilities in a manner that would have allowed it to compete with the broadband communication platform offered under New Jersey 2000.

Video dialtone, which is a direct outgrowth of New Jersey 2000, will prove to be a major competitor to the cable industry. In New Jersey, TKR faces competition from the video dialtone facility that was erected with limited regulatory oversight. The inequities with New Jersey's unregulated competitive services, such as video dialtone, are apparent. Since utilities have repeatedly argued that the cable industry be regulated in a similar fashion as the utilities, the Commission must provide relief to cable operators to ensure the existence of a level playing field between the cable industry and the telephone companies.

Voluntary upgrades instituted by TKR will be absolutely necessary for the company to survive amongst the competition it faces by utilities and other industries. In New Jersey, the advent of video dialtone has been realized. Cable operators must be afforded the regulatory mechanisms to adjust plant requirements necessary to meet competition. Benchmark price caps for cable were not established by consensus. Forcing cable operators to wait until "effective competition" or to undertake a costly and time consuming cost of service showing to be able to upgrade and modernize efficiently would place them at a severe competitive disadvantage and would grossly disserve the public interest.

II. IF AFFORDED EXTERNAL COST TREATMENT, TKR'S REQUIRED UPGRADES WILL SWIFTLY AND COST-EFFECTIVELY SERVE THE PUBLIC INTEREST.

The public interest will be served substantially by the implementation of TKR's upgrades if they are afforded external cost treatment. TKR's upgrades will enhance significant components of a cable system, boosting the quality of service provided to its customers. Characteristics of TKR's upgrades are increased channel capacity, expanded programming options, improved equipment reliability and picture quality, and full communications interfacing capability, including consumer friendly a la carte programming, increased pay-per-view and a full video and data platform.

A. Channel Capacity Will Be Increased.

TKR's upgrades will quickly augment system channel capacity pursuant to its franchise required upgrades. The average TKR system has approximately forty-two channels. Typical franchise required upgrades require TKR to expand its channel capacity to sixty channels. TKR intends to implement plans to voluntarily upgrade its average system to approximately 78 channels, if afforded external cost treatment. By voluntarily adding additional channels conterminously with the required upgrade, TKR will have effectively reconciled increased regulatory demands on channel capacity with subscriber expectations.

The 1992 Cable Act must-carry requirements have reduced the ability of cable operators to provide over their current channel capacities the diverse programming which subscribers have come to expect and has further augmented the pressure to increase channel capacity. TKR has been forced to drop various program offerings due to must-carry. For example, C-Span carriage has been reduced or deleted in several of TKR's systems; in other systems, locally originated programming has been reduced; and in other systems, niche cable programming services have been combined or eliminated.

In many cases, because of must-carry, the need for channels exceeds required upgrade capacity as well, in effect mandating additional capacity. Notably, requirements for increased channel capacity were established during a period when must-carry either did not exist or existed at a less burdensome level. External cost treatment afforded to both required and voluntary channel expansion is critical towards providing the means to successfully implement needed upgrades. As the Commission will recall, the provision of diverse programming and increased options to customers was one of the cornerstones of the 1992 amendments to the Communications Act. The increased capacity which will result from these upgrades will provide more channels for leased access and operator access for diverse voices.

B. TKR Will Be Able To Offer A Broadband Communications Platform.

Hand in hand with TKR's expanded channel capacity will be the ability to provide a broadband communications platform. The broadband platform proposed by TKR will eventually allow delivery of a fully interactive service to all customers. The most immediate benefit of the planned improvements will be a broader selection of services for all customers, consumer friendly features to utilize a la carte programming, and increased pay-per-view offerings. The implementation of these changes will not only increase video programming options, but will also improve customer choice.

C. TKR's Upgrades Will Provide Its Customers With Improved Equipment Reliability and Picture Quality.

TKR's upgrades will result in improved equipment reliability and picture quality, in keeping with advancements in technology. If upgrades are not regularly undertaken, equipment used by cable operators will soon become outdated and quality in cable service will decline. External cost treatment will allow cable operators, like TKR, to upgrade their cable systems regularly in order to keep up with technological advancements.

TKR's upgrades will also improve overall picture quality of its video programming, as technology warrants. The capability to undertake periodic updates for equipment and picture quality advancements will promote consumer satisfaction and allow cable systems to remain competitive in an increasingly advanced technological environment.

III. CONCLUSION.

TKR has budgeted approximately one quarter of a billion dollars to upgrade is plant and facilities. These upgrades will satisfy franchise imposed obligations, increase customer choice, improve the quality of service and permit TKR to compete as a broadband platform for communications services. If TKR cannot recover the costs attendant to these upgrades in a timely and cost efficient manner, it will be caught between violating its franchise obligations or violating its loan covenants. If TKR is permitted to treat these costs as external to its Benchmark rates, the public interest will be met, as fully described above. Accordingly, the Commission should permit cable operators external treatment of their required upgrade costs.

Respectfully submitted,

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